No. 13,226

United States Court of Appeals
For the Ninth Circuit

UNITED STATES OF AMERICA,
Appellant,

vs.

JOHN PHILLIP WHITE,
Appellee.

APPELLANT'S OPENING BRIEF.

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FILED
OCT 1 5 1952
PAUL P. O'BRIEN
CLERK

PERNAU-WALSH PRINTING CO., SAN FRANCISCO

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JURISDICTIONAL STATEMENT.

Originally, this action was instituted in the United States District Court for the Northern District of California, Southern Division, under the Federal Tort Claims Act, Title 28, U.S.C., Sections 1346(b) and 2671-2680. Following trial and judgment in favor of plaintiff, this appeal was commenced in the United States Court of Appeals for the Ninth Circuit, pursuant to Rule 73 of Federal Rules of Civil Procedure and Title 28 U.S.C., Sections 1291 and 1294.

STATEMENT OF THE CASE.

(All page references are to the printed transcript of record, unless otherwise noted.)

On November 22, 1946, John Phillip White, appellee, while at Camp Beale, Marysville, California, was injured by the explosion of a dud ammunition projectile located on that military reservation. At the time of the accident, appellee was removing scrap metal from the artillery strafing range located at Camp Beale. Appellee was present at this military reservation pursuant to a written contract executed between his employer, Mars Metal Company, a copartnership and the United States of America, through the Quartermaster Corps of the United States Army. The contract in question (Plaintiff's Exhibit No. 1) called for the removal by the appellee's employer of expended nonferrous shells from the various artillery ranges on Camp Beale. Prior to the time that appellee's employer entered into the contract with the United States Government, appellee, as representative and as an agent of his employer, had on two occasions visited Camp Beale for the purpose of determining the existence and extent of scrap metal on that military reservation. Appellee's original visit to Camp Beale was in September, 1946 (Tr. pp. 9 and 100), and again on October, 1946 (Tr. p. 108). On each visit, appellee discussed the manner of gathering scrap metal with the Range Officer, Captain Jones, and thereafter was taken on a personal tour of the various ranges by an assistant of Captain Jones, a Sergeant Hodges (Tr. pp. 101-107-109). Appellee secured and hired the services of several military personnel, who were off duty, to aid him in the collecting of the scrap metal (Tr. p. 114).

On the date of appellee's accident, November 22, 1946, which was his third day of collecting scrap metal at Camp Beale (Tr. p. 119), he was accompanied by one of his employees, a Private Lang, who was off duty, but who was attached to the Military Police at Camp Beale. On this occasion, appellee and Private Lang were working on the strafing range at Camp Beale in close proximity to one another. Private Lang, in his work of collecting scrap metal, picked up a piece of metal which appeared to the appellee to be iron and not the type that he desired to salvage. Private Lang after requesting appellee if he desired to salvage this type of metal (and being told, "no"), tossed the piece of metal to appellee (Tr. p. 120), who attempted to catch it, but was unable to do so, dropping the metal to the ground. The metal, upon being dropped by appellee, exploded, injuring the appellee and Private Lang. The metal that was discovered by Private Lang and thrown by him to appellee was, as far as can be determined, a 37 millimeter anti-personnel projectile (Findings XI, Tr. p. 67). As a result of the accident in question appellee suffered personal injuries.

PROCEEDINGS IN TRIAL COURT.

Appellee filed his Complaint for Damages in the United States District Court, Northern District of California, Southern Division, on November 12, 1947 praying for general and special damages aggregating the sum of $36,973.00 (Tr. p. 3). Thereafter on October 2, 1950, appellee filed his First Amended

Complaint amending and increasing his prayer for general and special damages to $60,028.39 (Tr. p. 13). On July 11, 1951, appellee filed his Second Amended Complaint again increasing and revising his general and special damages praying for judgment against appellant in the sum of $63,881.19 (Tr. p. 46).

Trial on the merits of this action was commenced in the honorable District Court for the Honorable George B. Harris on November 2, 1950. After due hearing on the merits and the reopening of the case to determine the question of damages, judgment was rendered in favor of appellee, John Phillip White awarding damages to him as follows: Special and general damages the aggregate sum of $55,081.19 payable in the following manner:

To the Industrial Indemnity Company, a corporation, on a subrogated claim of lien for medical and hospital expenses under the Workman's Compensation Law of the State of California, the sum of $3722.11, together with attorneys' fees in the sum of $930.53.

To Messrs. Huberman & Bloom, Attorneys for appellee, attorneys' fees in the sum of $11,016.24.

To John Phillip White, balances of said judgment after the deduction of the above items or a total of $40,432.84 (Conclusions of Law 11 and 12, Tr. p. 77; Judgment, Tr. pp. 79-81).

QUESTIONS RAISED ON APPEAL.

The appellant does herewith specify the following statement of points to be relied upon on appeal:

That the trial court erred

1. In finding that John Phillip White was not guilty of contributory negligence;

2. In giving plaintiff judgment in view of the fact that there is no proof of any negligence of any employee of the United States, or that plaintiff failed to connect an employee of the United States with the alleged negligence;

3. In finding that the clearing of the alleged dud area was not a discretionary act and hence within the exceptions of the Federal Tort Claims Act;

4. The failing to find that the plaintiff assumed the risk of his undertaking;

5. In failing to find that the United States was not under any obligations to keep the premises in a safe condition for licensees.

6. In finding that the United States was negligent, although there is no allegation of negligence as to any particular employee of the United States in the complaint or proven by the evidence.

7. In failing to find that the defendant had no duty to warn plaintiff of danger likely to be encountered by him; that defendant did warn plaintiff of possible danger;

8. In failing to find that the defendant was not obligated to make a careful or any inspection of the

premises in order to locate any danger which the plaintiff might encounter;

9. In failing to find that plaintiff's own employee was a direct or proximate cause of the damages or that the same was in the nature of an intervening cause;

10. In failing to find that plaintiff's own employee, a soldier, was the agent of plaintiff, and that said soldier was not acting within the scope of his employment;

11. In failing to find that the United States had no actual knowledge of any duds;

12. In finding that the Industrial Indemnity Company of San Francisco was entitled to $3722.11 or any sum whatsoever in this case.

ARGUMENT.

POINT I.

Specifications 1, 9, and 10 of Points to be relied upon by appellant in this appeal will be here jointly discussed.

Said points are to be as follows:

1. In finding that John Phillip White was not guilty of contributory negligence;

9. In failing to find that plaintiff's own employee was a direct and proximate cause of the damages or that the same was in the nature of the intervening cause;

10. In failing to find that plaintiff's own employee, a soldier, was the agent of plaintiff, and that said

soldier was not acting within the scope of his employment.

Appellant respectfully calls to the attention of this Honorable Appellate Court, the fact that the wording set forth in appellant's point 10 of points to be relied upon on appeal is not correctly stated and in effect the correct specification is *"that the plaintiff's own employee was the agent of plaintiff and that said soldier 'was' acting within the scope of his employment."* (Emphasis added.)

WAS APPELLEE GUILTY OF CONTRIBUTORY NEGLIGENCE?

Referring to the Honorable Trial Court's findings that appellee was not guilty of contributory negligence (Conclusions of Law 10, Tr. p. 77), appellant respectfully submits that this finding is unsupported by the evidence. Obviously, the trial court did not take cognizance of the fact that Private Lang, who pitched or threw a "chunk of iron" at appellee causing appellee to drop it and thereby to explode, was in fact an agent and an employee of appellee (Tr. pp. 120 and 121). Likewise, it was very apparent from the evidence that at the time this explosion occurred, Private Lang was acting as an employee of appellee, and working within the scope of his employment.

It cannot be conceived that the act of Private Lang towards appellee was anything but negligent. His conduct was certainly not of a prudent nature. Lang as a soldier was aware of, or as a member of the personnel of Camp Beale should have been aware of the

existence of duds and unexploded missiles within the area which he was working with appellee. It is not unreasonable to assume that Lang, as a trained soldier, skilled and trained in matters of ammunition, should have known that to throw or toss metal, looking like and having the appearance of expended artillery ammunition, might cause it to explode and injure appellee. Lang subsequent to the accident, admitted in writing that the iron chunk looked like a live shell (Defendant's Exhibit D). The record in this particular regard leads the appellant to the belief that the negligent act of Private Lang towards appellee proximately contributed to his injury, irrespective of any negligence theretofore existing on the part of the United States or any of its agents, or employees acting within the scope of their authority or employment which is not now conceded or admitted.

Thus, if appellee's agent, while acting within the scope of his authority was negligent towards appellee and such negligence contributed proximately to the injuries complained of by appellee the negligence of Private Lang towards appellee barred his recovery, such negligence being imputed to appellee and constituting contributory negligence on his part.

> "It is well established that one cannot recover damages for an injury negligently inflicted upon him when the injury is proximately contributed to by the negligence of his own servant, agent, or representative who at the time is engaged in the business of his employment, or, as commonly said, is acting within the scope of his authority. In such case, the principal is chargeable with con-

tributory negligence of his agent or servant and has no cause of action against a third party any more than if that contributory negligence had been his own personal act."

38 *American Jurisprudence* p. 922, sec. 236;
Krebs Pigment & Chemical Co. v. Sheridan, 12 Fed. Supp. 254, affirmed 79 Fed. 2d 479.

WAS THE ACT OF PRIVATE LANG IN THROWING THE IRON SHELL AT APPELLEE THE DIRECT AND PROXIMATE AND INTERVENING CAUSE OF APPELLEE'S INJURY?

To this question the evidence clearly discloses an affirmative answer. It cannot be doubted that Private Lang's conduct towards appellee was negligent, contrary to the Honorable Court's findings as to such an act being normal and natural and not an intervening cause (Findings of Fact XI, Tr. p. 68, Conclusions of Law 8, Tr. p. 76). Private Lang's act of negligence alone caused appellee's injury. Appellee cannot argue that if Lang had not picked up the piece of metal and had not tossed it to him, he would still have sustained the injuries of which he suffered. No act or conduct on the part of appellant caused the metal to explode. In the first instance, appellant calls to this Honorable Court's attention the fact that the instrumentality at the time it caused appellee's injury was not under appellant's control nor under the control of any of appellant's agents, servants, or employees acting within the scope of their employment or authority, but was, in fact, in the possession, control and custody of appellee's own agent.

Secondly, to place the legal burden of foreseeability on the United States as to the act and conduct of Private Lang would amount to placing an unreasonable duty and task upon appellant. In the firing of ammunition, the United States, through its agents and employees in the United States Army at Camp Beale could not in the exercise of reasonable and due diligence foresee or be placed with the burden of foreseeing that Private Lang, a soldier, who at the time of the accident was privately employed, would discover the unexploded shell and thereafter with complete disregard for the welfare of himself and his employer, who was in the immediate vicinity, toss or pitch the unexploded missile at his employer causing it to explode and bringing about injuries both to himself and the appellee. Such action by Private Lang is too remote to be anticipated or foreseen by appellant and such conduct by Private Lang constituted a new efficient and intervening negligent act that solely, directly and proximately caused and contributed to appellee's injuries, irrespective of any prior negligence on the part of appellant.

The doctrine of foreseeability cannot be extended to the point announced and proclaimed by the Trial Court in the instant case. Assuming that prior to the accident causing appellee's injury, appellant was negligent in his conduct and duty towards appellee in allowing unexploded duds and missiles to remain on the military ranges at Camp Beale without their being deactivated and decontaminated. Such negligence had only a casual connection with appellee's injuries. Con-

tinuing on the bare assumption that the appellant was negligent towards appellee, its negligence amounted only to the circumstance and not the cause of appellee's injuries. Appellant's act in leaving or allowing an undiscovered dud to remain on the strafing range at Camp Beale, at the most, furnished the opportunity for appellee's injury but not the result.

Therefore, appellant from the evidence, did nothing actively, affirmatively or immediately to bring about appellee's injury. The sole and proximate cause of appellee's injury was the act and conduct of Private Lang in throwing the unexploded shell to appellee. Lang was or should have been aware of the potential danger of the missile and, by not acting in accordance with the potential danger, proximately and solely caused appellee's injury.

Stewart v. United States, 186 Fed. 2d 627;
Schmidt v. United States, 179 Fed. 2d 724;
Hauser v. Pacific Gas & Electric, 133 Cal. App. 223 at 226.

To impose upon the appellant the task of anticipating, awaiting or foreseeing the conduct of Private Lang is to place a responsibility or duty upon the United States to guard against actions and conduct that is considered unusual, unlikely to happen and slightly probable. Such a burden is not the law. The occurrence of such unusual, unlikely or improbable actions is sufficient to relieve the appellant of liability towards appellee assuming in the first instance that there was negligent conduct by the appellant and towards the appellee. It is on this basis that appellant

asserts and submits that the trial court erred in its conclusion that the act of Private Lang was not an intervening cause relieving appellant of its negligence towards appellee (Findings of Fact XI, Tr. p. 68).

QUESTION.

WAS PRIVATE LANG AN EMPLOYEE OF APPELLEE AND ACTING WITHIN THE SCOPE OF HIS EMPLOYMENT AT THE TIME APPELLEE SUFFERED HIS INJURY?

On this point, the evidence is sufficiently clear to establish that at the time appellee was injured, Private Lang was acting as his employee. Appellee in his direct examination, admitted to the fact that he hired (Tr. pp. 118-119) Lang's employment for the purpose of aiding appellee in the recovery and salvaging of scrap metal which he was doing at the time of the explosion of the dud (Tr. p. 121). In addition, at the time of the accident, Lang was under the supervision of the appellee and subject to his control (Tr. p. 121). Continued and further argument on this point would be tedious and cumulative.

POINT II.

In an attempt to further simplify its argument, appellant jointly discusses herein Point 2 and Point 6 of its statement of its points to be relied upon on appeal. These specifications of error are:

2. In giving plaintiff judgment in view of the fact that there is no proof of any negligence of any em-

ployee of the United States, or that plaintiff failed to connect an employee of the United States with the alleged negligence;

6. In finding that the United States was negligent although there is no allegation of negligence as to any particular employee of the United States in the complaint or proven by the evidence.

Did the evidence show any negligence on the part of an employee of the United States, or did the plaintiff by its evidence show or connect any employee of the United States with the alleged negligence of appellant?

At the outset, it must be stated that under the Federal Tort Claims Act, in order for appellee to recover, there must be proof by the preponderance of the evidence that the United States was liable to appellee for his injuries because of negligence occasioned or which occurred through an agent, servant or employee of the government acting within the scope of his employment or authority (Tit. 28 U.S.C. 1346(b) 2671-2680).

In Re Texas City Disaster Litigation, 197 F. 2d 771.

This doctrine of liability to the United States for the negligent acts of its employees is based upon the doctrine of *respondeat superior.* In the instant case, the record is devoid of any showing of an omission or course of conduct of any identifiable government employee acting within the scope of his authority constituting negligence of the appellant.

Lauterbach v. United States, 95 F. Supp. 479.

From the record, appellant must come to the conclusion that the Trial Court's findings and judgments were predicated upon the fact that an unexploded missile was located on a military reservation of the United States, and not removed therefrom so as to avoid injuries to any persons legally entitled to be present upon said military reservation. Appellant cannot hold with this apparent legal principle so announced by the Honorable Trial Court. Mere possession or control of a dangerous instrumentality does not bring into existence the *respondeat superior* doctrine of liability as pronounced in the Federal Tort Claims Act. Possession of such an instrumentality such as an unexploded shell alone and in and of itself is not sufficient to establish liability on the part of the United States toward appellee.

United States v. Campbell, 172 Fed. 2d 500, cert. denied 377 U.S. 957;

United States v. Eleazer, 177 Fed. 2d 914, Cert. denied, 339 U.S. 903.

The mere happening of the accident which caused the appellee's injury is not sufficient to establish negligence which can neither be presumed nor inferred.

In the instant case, nothing is shown to indicate that any government employee was negligent in discovering or ascertaining the location or whereabouts of the explosive that caused the appellee's injury. Neither is it shown that the failure to discover such an explosive was negligence.

In all of his dealings with the United States Government appellee dealt with only two members of the

military personnel of Camp Beale, namely, Captain Jones and Sergeant Hodges. There is nothing in the record indicating how and in what manner either Sergeant Hodges or Captain Jones were negligent in causing or bringing about the injuries suffered by the appellee. The evidence, however, does show that in the course of his employment, Captain Jones, as the Range Officer at Camp Beale, took steps to locate and did locate unexploded duds prior to the time that the appellee initially visited Camp Beale and prior to the time that he commenced his salvage operations on that military base. Sergeant Hodges, in a written statement, has stated that all adequate steps were taken to clear the area and neither he nor anyone else to his knowledge knew of the dud's existence (Defendant's Exhibit No. L). The evidence further shows that a survey to ascertain the location of unexploded duds had been conducted by Captain Jones approximately a month prior to appellee's injury. Such a survey so carried out by Captain Jones was in accordance with the standard procedure carried on at Camp Beale for the purpose of locating duds (Tr. pp. 229; 254-255; 260-261 and 269). It must be respectfully called to the Court's attention that the mere presence of unexploded shells or duds on Camp Beale, after steps had been taken to ascertain their location, in conformity with standard procedure, does not constitute negligence on the part of an employee of the United States so as to allow a recovery by the appellee under the Federal Tort Claims Act.

Denny v. United States, 185 Fed. 2d 108;
Madden v. United States, 76 Fed. Supp. 41.

POINT III.

This portion of appellant's argument deals with Point 3 of its statement to be relied upon on appeal, namely, that the Trial Court erred in finding that the clearing of the alleged dud area was not a discretionary act and hence within the exceptions of the Federal Tort Claims Act.

In all actions brought under the Federal Tort Claims Act, the government is relieved of liability under Section 2860(a), Title 28 U.S.C., for injuries caused to third persons if the injury results in the exercise of a discretionary act.

The Trial Court in its Findings (Findings VIII, Tr. p. 85) and its interrogation of appellant's witness, Captain Jones (Tr. p. 288) placed great stress upon the manner and method in which the United States Army carries out its dedudding program at Camp Beale and appellant's failure or refusal to use mechanical sound devices to carry out this work. Reference is made to War Department Circular I-195 (Plaintiff's Ex. No. 12, Tr. pp. 215 and 216) as being the criterion and standard guide in the removing and neutralizing unexploded ammunition or duds on military reservations. This circular merely requires of the commandant of military reservations the removal or neutralizing of such ammunition or duds "so far as practical". Nothing is stated in the directive or required thereby as to how and in what manner and through what means, implements, devices, or instrumentalities, the neutralizing or removing process was to be accomplished. The means of accomplishing the

dedudding program was the discretionary act of the commandant of each military reservation where such a program was to be carried out. That this program was discretionary at Camp Beale was the uncontradicted testimony of Captain Jones (Tr. p. 289). The procedure of effecting the dedudding process had always been considered a discretionary one.

Appellant calls to the Honorable Court's attention the answers of Captain Charles D. Pitre to plaintiff's interrogatories (Defendant's Exhibit No. I), who testified in effect that the decontamination program at Camp Beale was carried out in accordance with accepted methods of the United States Army pursuant to its regulations. This testimony fortifies appellant's contention that the dedudding operations at Camp Beale was no more than a discretionary function of appellant acting through its agents, employees and military personnel on the military reservations, in question.

Although there are many decisions dealing with the discretionary exception to the Federal Tort Claims Act, there is little said or expressed by the Courts as to what exactly constitutes an act of discretion so as to bring appellant under the relief of liability announced in Section 2680(a) of the Federal Tort Claims Act. Simply stated: "an act of discretion" arises when an act may be performed in one or two or more ways either of which would be lawful and where it is left to the will or judgment of the performer to determine in which way it shall be performed.

27 *C.J.S.* page 134;

Markall v. Bowles, 58 Fed. Supp. 463.

Appellant earnestly urges that the rejection by the District Engineer of the Corps of Engineers in employing or using mechanical sounding devices to clear the artillery ranges of Camp Beale of unexploded projectiles and in the aid of the dedudding program of this military base pursuant to War Department Circular I-195, was discretionary.

The evidence discloses that previous dedudding practice at Camp Beale was by eye-sight and military personnel traversing the various fire-ranging areas marking discovered duds which are to be later removed or demolished by trained demolition crews (Tr. p. 261).

If the United States through the District Engineers determined that the previously employed practice of dedudding was the most practical means of effecting the decontamination of Camp Beale and that such a practice and operation previously employed was lawful, its decision not to follow a second and more expensive means of dedudding was a lawful decision unfettered by any known statutes or regulations thereby relieving appellant from any liability to appellee as a result of his injuries occasioned by the decontamination and dedudding practice at Camp Beale.

Kendrick v. United States, 82 Fed. Supp. 430;
Toledo v. United States, 95 Fed. Supp. 838;
North v. United States, 94 Fed. Supp. 824;
Coates v. United States, 181 Fed. 2d 816;
Old King Coal Co. v. United States, 88 Fed. Supp. 124.

POINT IV.

Appellant does here discuss Point 4 of its statement relied upon on appeal, namely, that the Court erred in finding that the plaintiff assumed the risk of his undertaking.

The Honorable Trial Court at the conclusion of the trial on the merits held that appellee did not assume the risk of his injuries when he became engaged in salvaging metal on the firing ranges at Camp Beale (Memorandum Opinion, Tr. p. 43, Findings of Fact, Tr. p. 69, and Conclusions of Law 9, Tr. p. 76).

Appellee's own testimony is to the effect that on his initial visit to Camp Beale and his inspection of the Camp's strafing range, where the accident in question occurred, appellee was told by Sergeant Hodges of the existence of an anti-tank projector located thereon (Tr. p. 105). He was further warned by Sergeant Hodges of the existence of duds or explosives in the area of the strafing range (Tr. p. 106). Appellee was shown a marked projectile or dud in the strafing area (Tr. p. 106). On his second visit to Camp Beale, appellee was warned by Captain Jones about cast iron projectiles of a type shown to him as having metal gilding around it (Tr. pp. 105 and 112). The type of projectile which was demonstrated to appellee by Captain Jones was in appearance similar to the one that Private Lang picked up and threw at appellee (Tr. p. 121). Appellee by his own testimony, was warned by Captain Jones of the existence of marked duds and to be careful of approaching them (Tr. p. 113). In the contract entered into between appellee's

employer and the United States government which was in fact executed by appellee in behalf of his employer (Plaintiff's Exhibit No. 1), it is specifically stated on the face of the contract that the contracting party should be the sole judge as to the area to be worked and to the extent of work to be done and that the removal of scrap metal was to be done "as is, where is". Appellee in a sworn, written statement stated, "I knew there were 'duds' out there" (Defendant's Exhibit A).

On this basis with previous knowledge of the existence of possible explosives and the admonition of two members of the military personnel of Camp Beale as to the possible existence of unexploded projectiles, it is appellant's contention that appellee, when he entered Camp Beale to pursue his salvaging operation, assumed the risk of the dangers to which he was forewarned and of which he had knowledge.

Appellant further submits to this Honorable Court's attention the testimony of Captain Pitre in answer to plaintiff's written interrogatories (Defendant's Exhibit No. I), wherein the Captain uncontradictedly testified to having given eleven separate warnings to appellee of the danger and possible existence of unexploded duds in the area in which he was to work. Captain Jones' testimony is likewise uncontradicted as to his having warned appellee of the possibility of unexploded shells on the ranges and not to approach such shells or questionable missiles (Tr. p. 237). Appellee testified that while he was salvaging metal on the various ranges, he warned his employee of a

marked dud and extended the approached radius around that dud (Tr. p. 118). Captain Jones further testified that there were numerous warning signs to the public as to the danger area and not to disturb any projectiles that they should discover (Tr. p. 240).

With all evidentiary facts before the Honorable Trial Court, uncontradicted as they were, the Trial Court rejected appellant's defense of assumption of the risk.

Appellee was clearly apprised of the existence of possible explosives (Tr. pp. 236-237). He must have appreciated, or should have, as a reasonable and normal individual, appreciated the hazard or danger then existing. In fact, he admitted knowledge of the danger (Defendant's Exhibit A). However, despite appellee's awareness of this danger, he continued to expose himself to a condition that was nothing less than hazardous. The risk of finding or touching unexploded projectiles was an incident of his employment. Appellee was getting scrap ammunition metal on an artillery range. As a person endowed with ordinary faculties, he should have anticipated, have been conscious of and known of the danger then existing from the facts given to him prior to the commencement of his work. Appellee further exercised no caution when he came face to face with the dangerous instrumentalities that caused his injury. The projectile that exploded had "a small piece of gilding metal on it" (Tr. p. 121). The dud that Sergeant Hodges showed appellee on his initial visit to Camp Beale and which was marked and later remarked by appellee, had a similar appearance (Tr. p. 105).

From all of these facts, appellant submits that when appellee commenced work at Camp Beale, pursuant to a contract to remove scrap metal "as is, where is", and in a manner in which he was to be sole judge, he assumed the risk of encountering unexploded projectiles and the possibility of being injured thereby.

Gleason v. Fire Protection Engineering Co., 127 Cal. App. 754;

Grassie v. American La France, 95 Cal. App. 384;

Goetz v. Hydraulic Press (Brick) Co., 320 Mo. 580, 60 A. L. R. 1064;

Weaver v. Shell Co., 34 Cal. App. 2d 713 at 721-722;

Ziesemer v. McCarthy, 71 Cal. App. 2d 378;

Hayes v. Richfield Oil, 38 A. C. 427;

Bazzoki v. Nance's Sanitorium Inc., 109 A. C. A. 246.

POINT V.

At this juncture of appellant's argument, appellant jointly discusses Points 5, 7, and 8 of its statement of points to be relied upon on appeal. The points subject to discussion herein are as follows:

5. In failing to find that the United States was not under any obligation to keep the premises in a safe condition for licensees;

7. In failing to find that defendant had no duty to warn plaintiff of danger likely to be encountered

by him; that defendant did warn plaintiff of possible danger; and

8. In failing to find that the defendant was not obligated to make a careful or any inspection of the premises in order to locate any danger which the plaintiff might encounter.

In the interest of time, appellant concedes that its contention in Point 5 that appellee was a licensee is in error and appellee was, in fact, a business invitee while at Camp Beale. Appellant concedes that as appellee was a business invitee upon its premises, appellant was under certain legal duties of care towards appellee. The duty of care imposed upon appellant was to keep the location where appellee was to work in a reasonably safe condition. Appellant was under no duty to act as an insurer for appellee's well-being, but only to use ordinary care in the protection of appellee. If then the existence of an unexploded shell constituted danger to appellee, and appellant knew of the existence of such danger, appellant was under a duty to warn or apprise appellee of that condition. The evidence is uncontradicted that appellant through its agents, Sergeant Hodges, and Captain Jones, did warn appellee of the existence of such a possible danger or hazard (Tr. pp. 106-112, 236 and 237). Having warned appellee of the possibility of a latent or concealed danger, appellant thereafter became relieved of responsibility towards appellee in the absence of a showing of any wilful or wanton conduct by appellant towards appellee.

See

Blodgett v. Dyas, 4 Cal. 2d 511;
Mautino v. Sutter Hospital Ass'n., 211 Cal. 556.

If the danger that existed on appellant's military reservation was obvious to appellee and appellee believes that such danger was obvious by the existence of marked duds on a strafing range which appellee was shown prior to the commencement of his salvaging activities (Tr. p. 106) and which he later remarked (Tr. p. 118) and which appellant admitted he knew existed (Defendant's Exhibit A), then appellant was under no duty to warn appellee of such an obvious danger.

Ambrose v. Allen, 113 Cal. App. 107;
Royal Insurance Co. v. Mazzei, 50 Cal. App. 2d p. 549.

Irrespective of whether there was a duty imposed upon appellant to warn or make appellee aware of the obvious danger of unexploded projectiles is of no consequence here as such a warning was given as disclosed by the evidence and in contradiction to the Honorable Trial Court's finding that no such warning was given by appellant to appellee (Finding 9, Tr. p. 65, Conclusions of Law 3, Tr. p. 74).

Dingman v. Mattox (A. & F. Co.), 15 Cal. 2d 622;
Jones v. Bridges, 38 C. A. 2d 341;
Brown v. San Francisco Ball Club Inc., 99 C. A. 2d 484.

Having warned appellee of the possible hazardous conditions and danger and appellee having been

familiarized and apprised of this danger, appellant contends that it was under no further duty to take affirmative steps to protect the well-being and welfare of appellee except to refrain from any conduct that would be considered wilful and wanton.

Appellant, being aware and cognizant of the fact that appellee was a rational and intelligent individual possessed of normal physical and mental faculties was thereafter justified in believing that appellee would take the necessary steps and exercise caution attendant with the obvious danger of which he had been made aware to protect himself.

Appellant having been imposed with the duty of forewarning appellee as a business invitee of dangerous defect obvious or latent that existed upon its military reservation and having so warned appellee of said condition complied with the duty imposed on it and in the absence of a showing of any wanton or unlawful conduct by it and towards appellee constituting wilful misconduct is relieved of any liability toward appellee for the injury suffered by him.

Referring to point 8 of its statement of points on appeal, appellant admits that this is incorrectly stated. Appellant having already conceded that appellee was a business invitee, there then rested upon appellee a duty of maintaining its premises in a reasonably safe condition and to exercise reasonable inspection to ascertain defects existing on the premises.

Appellant is not in accord with the Honorable Trial Court's ruling that its maintenance of the military

strafing ranges at Camp Beale was not reasonably conducted (Memorandum Opinion, Tr. p. 41). Appellant believes that such maintenance and inspection of its military strafing ranges was reasonable.

There is evidence that prior to appellee commencing his work on Camp Beale, there had been a survey carried out in accordance with long-established operational procedure to locate unexploded duds (Tr. pp. 261 and 262). Duds that were discovered and ascertained during the course of this survey were marked and appellee was warned of their possible existence (Tr. p. 237). Warning notices were posted on the target area admonishing the public of the existence of possible danger (Tr. p. 240; Defendant's Ex. H). The fact that the survey after having been conducted and carried out under normal procedure did not discover the dud that caused appellee's injury is not in and of itself sufficient to impose liability upon the appellant.

Shanley v. American Olive Co., 185 Cal. 552.

POINT VI.

Appellant contends that the Honorable Trial Court erred in finding that the United States had no actual knowledge of any duds.

With the possible exception of the dud Sergeant Hodges showed appellant (Tr. p. 106) and the admonition of Captain Jones that there was a possibility of unexploded projectiles in the area, there is nothing

in the evidence to show that appellant by and through its agents and employees, had any actual knowledge of further duds on Camp Beale and in particular had no knowledge of the existence or location of the dud which caused appellee's injury. Sergeant Hodges' statement (Defendant's Exhibit L) bears out this fact. Neither does the evidence indicate that any further survey reasonably conducted would have disclosed the dud that caused appellee's injury. An invitor of a business invitee is not liable for dangerous conditions on his premises in the absence of a showing that the condition was known or could have been discovered in the exercise of reasonable care and thereafter remedied.

Girvetz v. Boys Market Inc., 91 C. A. 2d 827.

The warning of Captain Jones to appellee that there was "a possibility" of unexploded duds does not constitute the appellant "knowing" of the dud that caused appellee's injury. The evidence is devoid of any inference that a demolition squad or a decontamination team could have located the dud. The projectile that caused appellee's injuries had the appearance of a "chunk of iron" (Tr. p. 121). From the physical appearance of this projectile as it was shown to appellee at the time of his injury, no conclusion can be drawn that a search would have lead appellant to consider this piece of metal a dud.

POINT VII.

In its final specification of error, point 12, appellant asserts that the Honorable Trial Court erred in allowing appellee's employer's Workman's Compensation Carrier, Industrial Indemnity Company, to share in the judgment.

Appellant calls this Honorable Court's attention to the recent decision of *United States v. Aetna Casualty and Insurance Company,* 338 U.S. 366, 94 L.Ed. 171, 70 Supreme Court 207, as its authority to refute the right of the Industrial Indemnity Company, a corporation, to share in the judgment rendered in favor of the appellee. It might well be admitted that the Industrial Indemnity Company was entitled to a right of a subrogee in recovering its payment of medical and hospital expenses paid to appellee. However, as announced in the *Aetna* case, supra, an insurance carrier to be entitled upon a wholly or partially paid claim to share in the judgment rendered against United States under the Federal Tort Claims Act must be a party plaintiff to the action as said insurance company is considered a real party in interest. In the instant case, the Industrial Indemnity Company was a real party in interest, but was not a plaintiff in the action. This insurance carrier was before the court only as a lien claimant, by virtue of two claims of lien filed in its behalf during the course of the trial (Tr. pp. 37-44). In no instance was the insurance carrier's rights to recover or share in the judgment ever litigated by the Trial Court.

The appellant as the sovereign can only be subjected to the claims of private citizens and third persons if it consents to be so liable. Appellant is unaware of any statute or decision that holds that the United States can be liable to a third person under the Federal Tort Claims Act without that party suing the government or joining as a party in interest in a suit pending against the United States. Until such a party becomes an interested person in an action brought under the Federal Tort Claims Act, there can be no adjudication by the Trial Court of its right of recovery or its right to share in any judgment rendered in that action.

Appellant respectfully submits that the Honorable Trial Court erred in giving judgment to the Industrial Indemnity Company in the sum of $3722.11 without said insurance carrier being before the Court as a real party in interest.

CONCLUSION.

In conclusion, appellant respectfully submits that the Findings of Fact and Conclusions of Law and the Judgment rendered by the Honorable Trial Court below in behalf of the appellee, were not and are not in accordance with the facts or the law in that,

a. The manner in which appellant cleared its military reservation of unexploded projectiles and shells was discretionary and within the exceptions of the Federal Tort Claims Act imposing liability upon the government of the United States;

b. That appellee was guilty of contributory negligence imputed to him by the act and conduct of his agent and employee, Private Lang, while acting within the scope of his employment;

c. That the act and conduct of Private Lang towards appellee while working in his behalf constituted a new efficient intervening, sole, and proximate cause of the injuries suffered and sustained by the appellee;

d. Appellee was fully aware, forewarned, and knew of the dangers existing at Camp Beale and the possibility of unexposed dangerous conditions attendant upon the fulfillment of his salvage operations and assumed the risk thereof;

e. Appellant exercised all reasonable caution and care required of it by the law in protecting appellee and warning him of the existence of "possible" dangers upon the firing ranges at Camp Beale;

f. That neither appellant nor its agents, servants, or employees acting within the scope of its employment were in any manner or way negligent toward appellee or did in any manner cause or bring about the injuries suffered by appellee;

g. The Honorable Trial Court erred in awarding judgment to the Industrial Indemnity Company, a corporation, for medical and hospital benefits for and on behalf of appellee without said subrogee joining and participating in the trial below as a party plaintiff having a real party interest.

For the reasons heretofore stated, it is respectfully submitted by appellant that the Trial Court's judg-

ment in favor of appellee should be reversed and an order made and entered by this Appeal Tribunal rendering judgment for and in favor of appellant.

Dated, San Francisco, California,
October 15, 1952.

Respectfully submitted,

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